Supreme Court, U. S.
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1977

No. 77-1197

WILFORD K. PULAWA, SR., also known as Nappy Pulawa; ALVIN GEORGE KAOHU; ROBERT R. WILSON, also known as Bobby Wilson; DANNETTE BEIRNE LEOTA, also known as Sister and HENRY JAMES HANALEI HUIHUI, also known as Henry W. Huihui,
Petitioners,

vs.

STATE OF HAWAII,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
to the Supreme Court of the State of Hawaii

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The petitioners, and each of them, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Hawaii entered in this proceeding on September 29, 1977, rehearing denied on December 6, 1977.

OPINION BELOW

The published opinion of the Hawaii Supreme Court is attached hereto as Appendix A. The unpublished decision and amended order of the Circuit Court of the First Circuit, State of Hawaii, regarding petitioners' motion to dismiss on Double Jeopardy grounds are attached hereto as Appendix B. The order and the unpublished oral opinion of the Circuit Court of the First Circuit, State of Hawaii, dismissing the conspiracy counts and declaring a mistrial are attached hereto as Appendix C. The unpublished opinion of the Hawaii Supreme Court denying rehearing is attached hereto as Appendix D.

JURISDICTION

The judgment of the Hawaii Supreme Court was entered on September 29, 1977 and rehearing was denied on December 6, 1977. The order remanding the matter for trial was filed on January 7, 1978. The Court's jurisdiction is invoked under 28 USC §1257(3).

QUESTION PRESENTED

Does the Double Jeopardy Clause of the Fifth Amendment prevent retrial of the petitioners after their original trial ended in a mistrial caused by gross prosecutorial negligence?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

I. Judicial Proceedings

The petitioners were indicted on February 13, 1974 for the crimes of murder, kidnapping and conspiracy to commit murder and conspiracy to commit kidnapping.[1] The jury trial of petitioners commenced on April 29, 1974. The State rested its case on July 8, 1974. On July 11, 1974, the trial court dismissed the conspiracy counts on the grounds that prosecution was barred by the statute of limitations; the prosecution had presented no evidence to support a conspiracy to commit the substantive crimes within the period permitted by the statute of limitations. At

[1]Specifically, all of the petitioners were charged with conspiracy to commit the murders and kidnappings of Lamont Constancio Nery and Dennis Masaichi Iha, while the actual murders and kidnappings were attributed to individual petitioners as perpetrators, principals and accessories.

that same time, the court declared a mistrial on the counts of murder and kidnapping essentially on the ground that the prosecution's conduct had resulted in the admission of evidence in support of the conspiracy counts which had prejudicially and incurably infected the proceedings. (Appendix C)

Defense counsel filed a motion to bar retrial and to dismiss the remaining charges on the ground that retrial would be in violation of the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and Article One of the Hawaii Constitution. The trial court at that time stated that the prosecution had been "negligent amounting to misconduct," which petitioners assert as tantamount to gross negligence, in the preparation and presentation of the case against petitioners. The trial court therefore granted the motion as to petitioners Pulawa and Kaohu; but the motion was denied as to petitioners Huihui, Leota and Wilson on the ground that they had consented to the mistrial. Over 3 years later, the Hawaii Supreme Court, on September 29, 1977, reversed the trial court's ruling as to petitioners Pulawa and Kaohu and affirmed as to petitioners Huihui, Leota and Wilson. The case was remanded for retrial as to all petitioners.

II. Facts of the Proceedings

The prosecution presented no evidence of a conspiracy to commit the substantive crimes charged falling within the statute of limitations. (Appendix

C). At the time of indictment the prosecution was aware that the statute of limitations had run on the conspiracy counts and that they had no evidence to support an attempt to conceal any such conspiracy.[2] Even so, conspiracy was charged enabling the State to present highly prejudicial and incompetent evidence in the nature of hearsay and double hearsay suggesting that petitioners were key figures in organized crime in Hawaii and had actually participated in at least 3 other murders and numerous illegal

[2]Deputy Prosecutors Weight and Halstead drafted the indictment and Deputy Prosecutor Grean presented the State's case to the jury. The following statements are from the transcript on the motion to dismiss.

p. 646 [Weight]
A. My best recollection is that I was aware that there was the statute of limitations question and that we discussed it.
Q. By "we discussed it," who did you discuss it with?
A. Douglas Halstead and myself.

p. 695 [Halstead]
Q. But whether you and Mr. Weight discussed this problem with other men or women in the office——
A. I didn't.

p. 714 [Halstead]
Q. Did you have any evidence other than silence in the two year period before February 13, 1974 to bring into the courtroom?
A. No specific overt acts.

p. 717 [Grean]
Q. Did you and Mr. Weight discuss the case?
A. I don't believe so.

p. 718 [Grean]
A. The only time I became familiar with the statute of limitations in connection with this case was when it was raised by Mr. Hart [defense co-counsel], and, at the end of trial. That is when it first dawned on me.

p. 719 [Grean]
A. At the time [of mistrial declaration] I didn't particularly care whether the statute of limitations had run or not.

transactions, including gambling and extortion.[3] Pretrial discovery was extremely limited in the State's favor and petitioners reasonably assumed the State would produce evidence in support of the conspiracy

[3]See transcript of June 21 and 24:
Handa—State witness on direct exam.
pp. 104-105
A. It was about February, I don't remember the date but only I know Harry Otake was killed a few weeks after.
. . .
Q. And you mentioned Harry Otake?
A. Yes.
Q. Is the date before or after Harry Otake's death?
A. After.
pp. 137-138 (re: conversation with a defendant)
A. I said I don't have $20,000, but if you don't have the $20,000, you better get the hell out of here, this Island.
. . .
A. If you don't have the $20,000, well, Mr. Pulawa says, we still keep running gambling game, you are going to pay me $200 a week.
pp. 172-173
A. Well, since 1970 I gambling, running, you know, gamblings game and between four years' time a lot of people get killed and still paying dues for these people so I make up my mind tell 'em the Court the truth what happens in 1970 my apartment.
Q. You mentioned a couple of gamblers that were killed?
A. Yes.
Q. you remember their names?
[objections]
See Transcript of July 1 and 2:
Ryder—State witness on direct exam.
p. 15
A. Yeh. We all left the same time. Then we got out there, we driving towards Mokuleia, by the quarry. Then Nappy said, we put 'em over here where the Pake stay, meaning Francis Young. He's buried out there some place.
Q. How do you know that?
A. Because him and Henry did it.
p. 65
A. It's when they had the State Fair, when Miranda got killed.
. . .
Q. Now, what was the purpose of getting together?
A. Going move on the Orientals; take away all the—— control all the gamblings and everything illegal in the State.
[objections]

charge. Defense counsel's numerous objections to the admission of the prejudicial evidence were overruled, as the evidence was considered by the court to be relevant to the charged conspiracy counts.

When the trial court dismissed the conspiracy counts it raised *sua sponte* the contamination of the evidence issue.[4] The prejudice to petitioners was obvious and defense counsel did not oppose the court's suggestion that a mistrial was necessitated. In its opinion on petitioners' motion to bar retrial, the trial court specifically cited prosecutorial misconduct as the ultimate reason for the mistrial. (Appendix B). Thus, petitioners' constitutional right to a fair trial by that particular tribunal was thwarted by the prosecution's gross negligence, resulting in unnecessary suffering, anguish, expense, and delay on the part of petitioners.

The Hawaii Supreme Court, in order to avoid the constitutional question, construed its own Rules of Procedure,[5] and recharacterized the trial court's find-

[4]See Transcript of July 8-10, 11.
p. 566
The Court: Mr. Grean, assuming that the Court grants the motion relating to the statute of limitations and throws out the conspiracy charges, what does that do to the State of the evidence?
Mr. Grean: Nothing.
The Court: Why not? Much of the evidence that was brought in was based on the conspiracy and the evidentiary conspiracy.

[5]Hawaii Rules of Civil Procedure, Rule 52, states:
. . .
Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.
At the hearing on the motion to dismiss the trial judge heard the testimony of 3 deputy prosecutors and determined

ings, labeling the issue as one of evidence. (Appendix A). In addition, it ruled that the prosecution's conduct was simply negligent and that the hearsay and double hearsay evidence was admissible regardless. Petitioners contend that this transparent attempt to circumvent their constitutional rights must be aborted.

REASONS FOR GRANTING THE WRIT

I. **The opinion of the Hawaii Supreme Court attempts to circumvent the constitutional question presented by this case and vitiates the protections afforded by the Fifth Amendment Double Jeopardy Clause of the United States Constitution; it fails to protect the Petitioners against a second trial caused by prosecutorial negligence amounting to prosecutorial misconduct.**

II. **The standard regarding the degree of prosecutorial misconduct or negligence sufficient to bar retrial is uncertain; consistency and certainty within the Criminal Justice System requires clarification and guidance by the United States Supreme Court.**

The Hawaii Supreme Court, without declaring the trial court's findings "clearly erroneous" as required by its own Rules of Procedure,[6] found the prosecution merely negligent and, as an afterthought, ruled that the prejudicial evidence was admissible anyway, thereby coloring the constitutional double jeopardy issue as mere evidentiary misunderstanding. It is

---

from that testimony that there had been gross prosecutorial negligence. While Rule 52 is a civil rule, its application should extend to criminal proceedings where an evidentiary hearing is held and findings of facts based thereon are issued by the judge.

[6]Id.

clear that such an obvious subterfuge by a State court to deny a constitutional right by interposing a nonfederal ground without fair support will not be tolerated by this Court. *Radio Station WOW v. Johnson,* 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945); *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux,* 279 U.S. 737, 49 S.Ct. 485, 73 L.Ed. 931 (1929). *See also: Mullaney v. Wilbur,* 421 U.S. 684 (1975).

In examining the facts of this case, the underlying policy of the Double Jeopardy Clause is of utmost importance. The State with great power and resources should not be allowed to make repeated attempts to convict a person for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty. *Green v. United States,* 355 U.S. 185, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). The petitioners herein were indicted over four years ago and are presently facing a new trial for the same offenses.

While this Court has made a distinction between mistrials granted *sua sponte* and those at defendant's request, petitioners claim that the Double Jeopardy Clause bars retrial in their case since the underlying prosecutorial error was ". . . motivated by bad faith or undertaken to harass or prejudice the defendant." *United States v. Dinitz,* 424 U.S. 600, 611, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). Mere negligence on the

part of the prosecutor will not activate a defendant's Double Jeopardy rights to bar retrial, but it is clear that where prosecutorial overreaching is present, the interest protected by Double Jeopardy outweighs society's interest in conducting a second trial. *United States v. Jorn,* 400 U.S. 470, 485, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); *United States v. Kessler,* 530 F.2d 1246, 1255-56 (5th Cir. 1976).

Therefore, the inquiry must center on the prosecutor's conduct. The prosecutor's office is an entity and has a heavy burden to insure communication of relevant information. *Giglio v. United States,* 405 U.S. 150, 154 (1972). Negligence is apparent in their total failure to uphold that burden, but to what degree? Did the prosecutor's conduct constitute gross negligence amounting to prosecutorial overreaching designed to harass the petitioners?

In *United States v. Martin,* 561 F.2d 135 (8th Cir. 1977), the Eighth Circuit Court of Appeals made it clear that gross negligence on the part of the prosecution could be just as detrimental to the defendant's rights as intentional misconduct. In *Martin* the prosecution introduced prejudicial grand jury testimony which included improper comments by the prosecution and the grand jurors. The facts in the instant case are even more compelling in that, in essence, the improper comments were accusations of murder. A more evident attempt by the prosecution to unfairly prejudice a defendant would be difficult to imagine. *See United States v. Martin,* supra, at 140.

The record in the case could not be more indicative of such gross negligence absent an admission of intent by the prosecutor. The prosecution was aware of and displayed a total lack of concern for the fact that the statute of limitations had run on the conspiracy counts. In fact, the State introduced highly prejudicial evidence citing the conspiracy as the foundation for its admission, insinuating that petitioners were responsible for at least three other murders and numerous extortions. In addition, the prosecution's reckless conduct resulted in a severe tactical disadvantage to petitioners; for example, the conspiracy counts rendered a *Bruton* motion useless. *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

The prosecution's overzealous effort to convict the petitioners by introducing unrelated criminal activity with the implication that petitioners were responsible was predicated on the conspiracy charges which were absolutely invalid, and which the prosecutors knew were invalid. The record is the best evidence of the prosecution's gross negligence which was paramount to an intentional disregard for the law and for the rights of petitioners.

CONCLUSION

Accordingly, this Court should grant certiorari in order to affirmatively respond to the needs of the fair administration of criminal justice in this country. In

view of the presentation set forth above, we respectfully submit that this petition for writ of certiorari is meritorious and should be granted.

Respectfully submitted,

DAVID C. SCHUTTER,
Attorney for Petitioners
Pulawa and Kaohu.

BROOK HART,
Attorney for Petitioners
Huihui, Leota and Wilson.

February, 1978.

(Appendices Follow)

Appendices

Appendix A

In the Supreme Court of the State of Hawaii

October Term 1976

State of Hawaii, Plaintiff-Appellant, vs. Wilford K. Pulawa, Sr., also known as Nappy Pulawa, and Alvin George Kaohu, Defendants-Appellees.	No. 5917
and	
State of Hawaii, Plaintiff-Appellee, vs. Robert R. Wilson, also known as Bobby Wilson, Dannette Beirne Leota, also known as Sister, and Henry James Hanalei Huihui, also known as Henry W. Huihui, Defendants-Appellants.	No. 5923

[Filed Sep. 29, 1977]

Appeal from First Circuit Court
Honorable Walter M. Heen, Judge

RICHARDSON, C.J., KOBAYASHI, OGATA, MENOR and KIDWELL, JJ.

Former Jeopardy—mistrial—defendant's consent—manifest necessity

Where a mistrial is declared without the consent of the defendant, and there is an absence of manifest necessity for the mistrial, a retrial will be barred by double jeopardy.

Same—same—same—judicial or prosecutorial error

Where the defendant moves for or consents to a mistrial, even though the consent is necessitated by judicial or prosecutorial error, the barrier to reprosecution is ordinarily removed.

Same — mistrial — defendant's motion — judicial or prosecutorial overreaching

Where the defendant's mistrial motion is the necessary response to judicial or prosecutorial overreaching designed to avoid an acquittal, or is necessitated by deliberate misconduct which has for its intended purpose the denial of the defendant's constitutional right to a fair trial, and such bad faith conduct has resulted in serious and incurable prejudice to the defendant, reprosecution will be barred.

Conspiracy—evidence—admissibility

A conspiracy may always be shown as an evidentiary fact to prove participation in the substantive crime, and a formal charge in the indictment is not a necessary predicate to the admissibility of facts and circumstances showing the existence of a conspiracy to commit the principal offense charged.

Same—same—same—declarations of co-conspirator

The prosecution is entitled to adduce evidence of declarations made by a co-conspirator pursuant to and in furtherance of the conspiracy, and such declarations are admissible against the other conspirators.

Same—same—same—judicial discretion

The reception of evidence touching upon the existence of conspiracy is necessarily subject to the exercise of sound judicial discretion.

Per Curiam. On February 13, 1974, the defendants were indicted for the crimes of kidnapping, conspiracy, and murder. Specifically, the indictment charged that the defendants had conspired with one another to kidnap Dennis Masaichi Iha and to murder Lamont Constancio Nery and Dennis Masaichi Iha, and that they did in fact kidnap Lamont Constancio Nery and Dennis Masaichi Iha and did in fact murder Lamont Constancio Nery and Dennis Masaichi Iha. Mr. Brook Hart represented defendants Huihui, Leota, and Wilson. Mr. David Schutter represented defendants Kaohu and Pulawa.

The trial of the defendants before a jury commenced on April 29, 1974. The State rested its case on July 8, 1974. On July 11, 1974, the trial court dismissed the conspiracy counts on the ground that

prosecution was barred by the statute of limitations. At the same time the court declared a mistrial on the counts of kidnapping and murder, essentially on the ground that the admission of evidence supportive of the conspiracy counts, which it had dismissed, had prejudicially infected the proceedings as to these remaining counts in the indictment. On April 21, 1975, Mr. Hart and Mr. Schutter jointly filed a motion to dismiss the remaining charges in the indictment, on the ground that a retrial would constitute double jeopardy, in violation of Article I of the Hawaii Constitution, and in violation of the Fifth and Fourteenth Amendments to the United States Constitution. The trial court granted the motion as to defendants Pulawa and Kaohu but denied it as to defendants Huihui, Leota, and Wilson, explaining:

> "This would conclude the matter at this point were it not for the fact that as to the defendants Huihui, Wilson and Leota, the Court finds that there was consent to the declaration of the mistrial. The arguments proposed by counsel for those defendants when the Court raised the question of mistrial indicates clearly that the defendants did not merely consent to, but urged the mistrial upon the Court. The mere written record does not reflect the vigor and zeal with which counsel urged the action upon the Court.
>
> "Insofar as the defendants Pulawa and Kaohu are concerned, we are faced with another situation. Counsel for those defendants did not join in the argument propounded by counsel for Huihui, Wilson and Leota. While there would appear to be tacit joinder in the argument and consent to the mistrial, the cases regarding mistrial indicate quite strongly that more positive evidence of consent is required. There is insufficient showing of consent by those defendants indicated in this case. Therefore, as to the defendants Pulawa and Kaohu, the Court finds that a re-trial of the charges as to them would violate the constitutional prohibition against double jeopardy. Therefore, the charges will be dismissed as to defendants Pulawa and Kaohu."

Defendants Huihui, Leota, and Wilson appeal from the amended order denying their motion to dismiss the indictment against them, and the State appeals from that portion of the order dismissing the charges against defendants Pulawa and Kaohu.

I

Where a mistrial is declared without the consent of the defendant, and there is an absence of manifest necessity for the mistrial, a retrial will be barred by double jeopardy. *United States v. Perez,* 22 U.S. (9 Wheat.) 579 (1824); *United States v. Jorn,* 400 U.S. 470 (1971); HRS § 701-110(4). At issue initially, therefore, is, whether all of the defendants consented to the mistrial. The record shows that they did.

The State offered its first witness on June 21, 1974. The State's two principal witnesses were Clarence Handa and Roy Ryder. Mr. Handa finished testifying on June 25, 1974. Mr. Ryder took the stand on July 1, 1974, and completed his direct testimony just before court adjourned on that day. On the following day, July 2, 1974, Mr. Schutter and Mr. Hart jointly

filed a written motion for mistrial based on what they asserted was prejudicial testimony elicited by the State, over their objection, from Mr. Handa and Mr. Ryder. This motion for mistrial, with other defense motions,[1] was heard on July 10, 1974, after the State had rested its case. Mr. Schutter argued for the motion for mistrial, and on at least two occasions Mr. Hart was asked by the court if he joined in Mr. Schutter's motion for mistrial. Both times Mr. Hart replied in the affirmative. The trial court took the various motions under advisement, and on July 11, 1974, announced its rulings. The motion for mistrial was granted and it was Mr. Schutter who prepared

[1]The following are excerpts from the transcript of the proceedings of July 10, 1974:

THE COURT: Very well. Who is going to argue first? Mr. Schutter or Mr. Hart?

MR. SCHUTTER: Well, we have three motions, Your Honor.

THE COURT: We'll get to that after we find out which one of you is going to argue first.

MR. HART: Well, it would depend on which motion the court——

THE COURT: I see. All right. Which motion, well, let's take the motion for mistrial first then.

MR. SCHUTTER: In connection, Your Honor, with the motion for a mistrial, I simply note for the record that we have filed a written motion for mistrial on the heels of a number of oral requests therefor, on July 2, 1974. That motion incorporated a memorandum and point of authorities and Exhibit A, that at the same time we filed that's entitled Supplemental Memorandum in Support of the Motion for Mistrial, and Exhibit A, thereto.

• • • •

MR. SCHUTTER: . . . We would submit the motion for mistrial based on that record.

THE COURT: Mr. Hart, you are not arguing on this motion? You're joining——

MR. HART: I join Mr. Schutter's motion. I see no reason to repeat his argument.

the order "granting motion for mistrial," which was filed on July 15, 1974.

The order terminating the prosecution was clearly in response to a motion made by the defendants. That the trial court granted the motion on grounds not originally and expressly advanced by the defendants at the time they filed their written motion is not of material consequence. For that matter, the ground finally adopted by the court in granting the motion was predicated upon the very point raised by both Mr. Schutter and Mr. Hart in oral argument.[2] Having moved for a mistrial, and the trial court having considered their request and declared a mistrial, defendants Pulawa and Kaohu cannot now be heard to complain that the termination of the prosecution was without their consent. HRS § 701-110(4)(a); *see also, MacPherson v. State,* 533 P.2d 1103 (Alaska), *cert. denied* 423 U.S. 871 (1975); *People v. Kelly,* 132 Cal. App. 118, 22 P.2d 526 (1933).

[2]MR. HART: . . . Our position on that thing, Your Honor, is the jury has been unfortunately and unnecessarily infected with all that evidence and no instruction from the court could cure such a thing, and the court would have to declare a mistrial. It's as though we tried the case on top of the case and found that the case we tried on top of the case had no business being there in the first place; that the government had no business charging them and as a result it's a do over.

• • • •

MR. SCHUTTER: Your Honor, had there been no conspiracy charged, many of the hearsay statements offered in evidence by the prosecution, hearsay statements primarily made by one defendant—I don't believe there is any evidence in the case that anybody else ever said anything—all of the evidence is things said by Mr. Pulawa, would not have been admissible in any way, shape or form, under any theory against my other client, Mr. Kaohu, or against any of Mr. Hart's three clients.

Furthermore, the record shows that after the declaration of mistrial and before the jury was discharged, the State moved to be allowed to take an interlocutory appeal from the order and requested that the jury not be discharged pending the determination of the appeal. This was tantamount to a request for a stay of the order declaring a mistrial. Both Mr. Hart and Mr. Schutter, however, opposed the State's motion and urged instead that the jury should be discharged. Thereupon the court denied the State's request and advised the jury that "the court has granted the defense motion for mistrial which means that this trial is ended." Under these circumstances it cannot reasonably be said that the defendants did not consent to the declaration of mistrial and the resulting discharge of the jury. *Cf. Adkins v. Smith,* 205 So.2d 530 (Fla. 1968). From the record, we find that the trial court erred in holding that defendants Pulawa and Kaohu did not consent to the mistrial.

II

Where the defendant consents to a declaration of mistrial, even though the consent is necessitated by judicial or prosecutorial error, the barrier to reprosecution is ordinarily removed; *United States v. Dinitz,* 424 U.S. 600 (1976); *United States v. Jorn, supra; United States v. Kessler,* 530 F.2d 1246 (5th Cir. 1976); *United States v. Jamison,* 505 F.2d 407, 410 (D.C. Cir. 1974). This principle is consistent with the double jeopardy consideration that the defendant should "retain primary control over the course to be

followed in the event of such error." *Id.* at 609. In *Jorn,* the Supreme Court held:

> If that right to go to a particular tribunal is valued, it is because, independent of the threat of bad-faith conduct by judge or prosecutor, the defendant has a significant interest in the decision whether or not to take the case from the jury when circumstances occur which might be thought to warrant a declaration of mistrial. Thus, where circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. 400 U.S. at 485.

However, where the defendant's mistrial motion is the necessary response to judicial or prosecutorial misconduct designed to avoid an acquittal, or is necessitated by deliberate misconduct which has for its intended purpose the denial of the defendant's constitutional right to a fair trial, reprosecution will be barred. *United States v. Dinitz, supra; United States v. Jorn, supra; United States v. Kessler, supra.* A basic policy underlying the Double Jeopardy Clause is to relieve the defendant of the substantial burdens imposed by multiple prosecutions. *United States v. Dinitz, supra.* Accordingly, where the defendant is provoked by judicial or prosecutorial overreaching into requesting a mistrial and his motion is granted, he may not be retried for the same offense. *Id.* This result will necessarily obtain where the bad faith conduct charged has seriously and incurably prejudiced

the defendant in his defense. *See United States v. Kessler, supra.*

Having determined that all of the defendants consented to the declaration of mistrial, we now reach the crucial issue of whether there was prosecutorial overreaching in this case. If there was, and serious and incurable prejudice to the defendants was its logical concomitant, then the motion to dismiss should have been granted for all defendants and not only as to defendants Pulawa and Kaohu.

The thrust of the defendants' allegations of prosecutorial overreaching is that the State exercised bad faith in charging them with conspiracy; that as a proximate result of the State's conduct they were seriously prejudiced in their defense to the remaining counts of the indictment, inasmuch as certain prejudicial evidence adduced before the jury would not have been allowed by the court in the absence of the formal charges of conspiracy.[3]

We have examined the record, including the transcript of the proceedings in the circuit court, and

[3]The trial court apparently accepted the view of the defendants that the presence of a conspiracy charge in the indictment, or the absence thereof, was material to the question of admissibility:

> There is also a growing body of thought in the field of criminal law that the charge of conspiracy, brought together with other charges of substantive crimes, gives to the government an advantage over the defendants which is unfair in the extreme. This is because, in particular, that on the basis of a conspiracy charge a statement made by one defendant can be used against other defendants who are alleged to be part of the conspiracy. It should be noted here that this is precisely what happened in the case at bar. All of the testimony indicated that all incriminating statements were made by defendant Pulawa.

have come to the conclusion that there was no prosecutorial overreaching in this case. The prosecution obviously erred in its assessment of the evidence available to support the formal charges of conspiracy. This error was compounded by its faulty interpretation of the applicable statute of limitations. But there was no deliberate misconduct in the charging of the conspiracy offenses. At worst, there might have been prosecutorial negligence involved.[4] But simple negligence falls far short of the prosecutorial overreaching requisite to the imposition of the double jeopardy prohibition to a retrial. *Muller v. State,* 478 P.2d 822 (Alaska 1971); *United States v. Beasley,* 479 F.2d 1124 (5th Cir.) *cert. denied* 414 U.S. 924, *reh. denied* 414 U.S. 1052 (1973).

The defendants take the position that the State attempted deliberately to gain an unfair trial advantage by formally charging them with conspiracy. But the rule is that a conspiracy may always be shown as an evidentiary fact to prove participation in the substantive crime, and a formal charge in the indictment is not a necessary predicate to the admissibility of facts and circumstances showing the existence of a

[4]When ruling upon the motion for mistrial, the court made the following finding:

> The evidence adduced at the hearings on Defendants' motion indicates clearly that there was prosecutorial negligence in preparing the indictment and in pre-trial preparation, in that there was little, if any, communication within the prosecutor's office regarding the theories of the deputies who prepared the indictment and the evidence to support the inclusion of the conspiracy charges. The ultimate result of this prosecutorial negligence was that there was no attempt during trial even to introduce evidence showing a continuing conspiracy.

conspiracy to commit the principal offense charged. The law is clear in this regard. *See Territory v. Blackman,* 32 Haw. 460, 464-466 (1932); *State v. Yoshino,* 45 Haw. 640, 372 P.2d 208 (1962); *Territory v. Goto,* 27 Haw. 65 (1923); 16 Am.Jur.2d, *Conspiracy,* § 37. The charges of conspiracy in this case were directed towards the substantive crimes for which the defendants were also charged in the indictment. It would make no difference, therefore, on the question of evidentiary admissibility whether or not conspiracy to commit these particular offenses was formally charged.

The prosecution is generally entitled to show the entire history of a conspiracy to commit crimes, including the substantive crimes charged, from the time of its inception until its consummation. *Territory v. Blackman, supra; Territory v. Kitabayashi,* 41 Haw. 428, 434-436 (1956). It is entitled to adduce evidence of declarations made by a co-conspirator pursuant to and in furtherance of the conspiracy. Such declarations are admissible against the other conspirators. *State v. Yoshino,* 45 Haw. 206, 364 P.2d 638 (1961); *Territory v. Blackman, supra; Territory v. Kitabayashi, supra.* Defendant Pulawa's declarations fall into this category.

The evidence of which the defendants complain was not limited to the formal charges of conspiracy. If admissible, it was admissible both as to the charges of conspiracy and as to the substantive crimes charged. We have examined the record, and while we are not called upon to decide the propriety of the

separate evidentiary rulings of the trial court, we are constrained to observe that much of this evidence was admissible with respect to the substantive crimes charged. The reception of evidence touching upon the existence of a conspiracy is necessarily subject to the exercise of sound judicial discretion. *Territory v. Goto, supra.* If error was committed in the reception of certain of the evidence, it was judicial error. There was no judicial overreaching in this case, and none has been charged.

The amended order denying the motion to dismiss the charges against defendants Huihui, Leota, and Wilson is affirmed, and that part of the order granting the motion to dismiss the indictment against defendants Pulawa and Kaohu is reversed. Remanded.

/s/ William S. Richardson

/s/ Bert T. Kobayashi

/s/ Thomas S. Ogata

/s/ Benjamin Menor

/s/ H. B. Kidwell

Roy Chang, Deputy Prosecuting Attorney (George Yamamoto, Deputy Prosecuting Attorney, on the briefs) for plaintiff-appellant, cross-appellee

Brook Hart for defendants-cross-appellants, Huihui, Wilson and Leota

David C. Schutter for defendants-appellees Pulawa and Kaohu

Appendix B

In the Circuit Court of the First Circuit
State of Hawaii

Cr. No. 46476

State of Hawaii,

vs.

Wilford K. Pulawa, Sr., also known as Nappy Pulawa, Alvin George Kaohu, Robert R. Wilson, also known as Bobby Wilson, Dannette Beirne Leota, also known as Sister, and Henry James Hanalei Huihui, also known as Henry W. Huihui,

Defendants.

[Filed Jun. 2, 1975]

AMENDED ORDER

Based upon the decision heretofore rendered on Defendants' Motion to Dismiss, it is hereby order that all charges herein against the defendants Wilford K. Pulawa, Sr. and Alvin George Kaohu be and they are hereby dismissed.

Said defendants will be discharged and all bail or bond cancelled.

The Motion to Dismiss on behalf of defendants Robert R. Wilson, Dannette Beirne Leota, and Henry James Hanalei Huihui is denied.

Dated: Honolulu, Hawaii, June 2, 1975

/s/ Walter M. Heen,
Judge of the Above Entitled Court

DECISION

Defendants' motion to dismiss raises the question whether another trial of the kidnapping and murder charges still pending against them would be in violation of the Constitutional prohibition against double jeopardy.

Defendants contend that inclusion of the conspiracy charges in the indictment was a ploy by the Government to support evidence otherwise inadmissible. This, defendants argue, was prosecutorial misconduct which created the necessity for the declaration of mistrial by this Court on July 11, 1974.

The Government's theory in preparing the indictment that there was a continuing conspiracy was extremely tenuous in light of the evidence known to the Government at that time. The other theory of the Government resulted from a negligent reading of the statute of limitations and lack of knowledge of the existence of a substantive crime of "compounding."

The evidence adduced at the hearings on Defendant's motion indicates clearly that there was prosecutorial negligence in preparing the indictment and in pre-trial preparation, in that there was little, if

any, communication within the prosecutor's office regarding the theories of the deputies who prepared the indictment and the evidence to support the inclusion of the conspiracy charges. The ultimate result of this prosecutorial negligence was that there was no attempt during trial even to introduce evidence showing a continuing conspiracy.

There is a growing body of law to the effect that prosecutorial negligence can be as damaging to the defendants' rights to a fair trial as deliberate prosecutorial action and that such negligence should be considered as prosecutorial misconduct.

There is also a growing body of thought in the field of criminal law that the charge of conspiracy, brought together with other charges of substantive crimes, gives to the government an advantage over the defendants which is unfair in the extreme. This is because, in particular, that on the basis of a conspiracy charge a statement made by one defendant can be used against other defendants who are alleged to be part of the conspiracy. It should be noted, here, that this is precisely what happened in the case at bar. All of the testimony indicated that all incriminating statements were made by defendant Pulawa. It is now being considered in many legal circles that there should be a complete elimination of the conspiracy charge. There is also a line of thought which indicates that one day in the not too distant future the Supreme Court will strike down the use of conspiracy charges for the purpose of introducing out-of-court statements by one defendant against the others. This

is for the reason that the alleged co-conspirators have thus been deprived of their right to cross examination, guaranteed by the U. S. Constitution.

On the basis of the evidence produced at the hearings on defendants' motion to dismiss, and on the entire record the Court finds that the necessity to declare a mistrial at the close of the government's case was caused by the prosecutor's actions in the case. The Court further finds that such action was prosecutorial misconduct.

This would conclude the matter at this point were it not for the fact that as to the defendants Huihui, Wilson and Leota, the Court finds there was consent to the declaration of the mistrial. The arguments proposed by counsel for those defendants when the Court raised the question of mistrial indicates clearly that the defendants did not merely consent to, but urged the mistrial upon the Court. The mere written record does not reflect the vigor and zeal with which counsel urged the action upon the Court. Therefore, as to those defendants Huihui, Wilson and Leota the motion to dismiss will be denied.

Insofar as the defendants Pulawa and Kaohu are concerned, we are faced with another situation. Counsel for those defendants did not join in the argument propounded by counsel for Huihui, Wilson and Leota. While there would appear to be tacit joinder in the argument and consent to the mistrial, the cases regarding mistrial indicate quite strongly that more positive evidence of consent is required. There is insufficient showing of consent by those defendants indi-

cated in this case. Therefore, as to the defendants Pulawa and Kaohu the Court finds that a re-trial of the charges as to them would violate the constitutional prohibition against double jeopardy. Therefore, the charges will be dismissed as to defendants Pulawa and Kaohu.

Appendix C

In the Circuit Court of the First Circuit
State of Hawaii

Cr. No. 46476

State of Hawaii,

vs.

Wilford K. Pulawa, also known as Nappy Pulawa, Alvin George Kaochu, Robert R. Wilson, also known as Bobby Wilson, Dannette Beirne Leota, also known as Sister, and Henry James Hanalei Huihui, also known as Henry W. Huihui,

Defendants.

1 & III: Kidnapping
II, V, & VI: Conspiracy 1°
IV: Accessories before the fact
VII: Murder 1°
VIII & IX: Principals to murder 1°

[Filed Jul. 15, 1974]

ORDER GRANTING MOTION TO DISMISS AS TO COUNTS II, V & VI; GRANTING MOTION FOR MISTRIAL; AND DEEMING MOTION IN LIMINE MOOT

The prosecution having rested its presentation of evidence and its case in the above-entitled cause on

Monday, July 8, 1974, and counsel for the defendants having urged various motions, and the Court having heard oral argument thereon on Wednesday, July 10, 1974, and having rendered its oral ruling thereon on Thursday, July 11, 1974, and good cause having appeared therefrom,

It Is Hereby Ordered granting the Motion to Dismiss as to Counts II, V & VI on the ground and for the reason that prosecution under such counts is barred under the statute of limitations, as more fully set forth in the oral ruling of the Court on July 11, 1974; and

It Is Further Ordered granting the motion of counsel for the defendants for a mistrial for the reasons set forth in the Court's oral ruling of July 11, 1974; and

It Is Further Ordered deeming the Motion in Limine filed by counsel for the defendants seeking to limit cross-examination of the defendants as moot in light of the orders set forth above, and the Court therefore declines to rule thereon.

Dated: Honolulu, Hawaii, July 12, 1974

/s/ Walter M. Heen,
Judge of the Above-Entitled Court

I do hereby certify that this is a full, true, and correct copy of the original on file in this office.

H. Seto

.....

Clerk, Circuit Court, First Circuit
State of Hawaii

Exhibit A

[106] (Court recessed at 2:58 p.m.)
Thursday, July 11, 1974.
8:47 a.m. Session.

THE CLERK: Criminal 46,476, State of Hawaii versus Wilford K. Pulawa, Alvin George Kaohu, Robert R. Wilson, Dannette Beirne Leota, and Henry James Hanalei Huihui, defendants. Ruling on motion.

THE COURT: The record will show the presence of all counsel and all of the defendants. The record will also show the jury is not present.

The court has examined the authorities cited by both prosecution and defense in this particular case, and has arrived at the following determinations:

The motions for directed verdict as to each count are all denied. However, with respect to Count Two of the indictment, Count Five and Count Six of the indictment, these related to the conspiracy charges, the court finds that the indictment, the prosecution was commenced beyond the two-year statutory limitation provided in the Hawaii Revised Statutes and beyond the three-year statute of limitation provided for in the Hawaii Penal Code. Under either, the Penal Code or the Hawaii Revised Statutes, the prosecutions are barred. While there may be some argument as to whether or not there is waiver in this case, the court does not feel that the arguments have any merit.

[107] As stated in Waters versus United States, 328 Fed Second 739, at 742, this statute of limitations

as found in the revenue laws is inconsonance with the policy with policy of repose that is fundamental to our society and our criminal laws. At 743, the court goes on to say society is likely to be healthier on the whole if an individual suspected of a non-capital offense is either charged within, is charged, is either charged within a specified time or else is relieved of the never ending possibility of public accountability for an accusation arising out of the long ago. Unlike the statute of limitations in civil cases, it is not a mere limitation upon the remedy but a limitation upon the power of the sovereign to act against the accused.

The court goes on to say again, if recognition of a distinction between the statute of repose in civil cases and the substantive bar in criminal cases is to have any meaning in the administration of criminal justice, the statute of limitations must be held to affect not only the remedy but to operate as a jurisdictional limitation of the power to, upon the power to prosecute and punish. In People versus McGee, 36 Pacific Second at 378, the California court said, in our view the more desirable rule is that the statute is jurisdictional, and that an indictment or information which shows on its **[108]** face that the prosecution is barred by limitations fails to state a public offense. The point may therefore be raised at any time, before or after judgment.

Court again points out the distinction between the statute of limitations as it applies to civil cases and criminal cases.

It follows that where the pleading of the State shows that the period of the statute of limitations has run, and nothing is alleged to take the case out of the statute, for example, that the defendant has been absent from the state, the power to proceed in the case is gone.

Court therefore rules that Counts Two, Five and Six will be dismissed by virtue of the court lacking jurisdiction to proceed. The government not having authority to proceed with prosecution in this case.

This leaves us with Counts One, Three, Four, Seven, Eight and Nine. These relate to the alleged crimes of kidnapping and murder. The evidence which was produced by the government and admitted in the course of the trial contains testimony and other evidence relating to not merely the counts that remain in the indictment but to the conspiracy counts and further to the so-called evidentiary conspiracy which is argued by the prosecution. Having now dismissed or ordered the conspiracy counts to be dismissed, we are then faced with the problem of **[109]** instructing the jury as to what parts of the evidence they may consider for the substantive charges that remain and what parts of the evidence they must disregard, in order to arrive at their decision and verdict.

As the court stated briefly yesterday, it is doubtful that even the court or the court together with counsel could arrive at any kind of decision as to what parts of the evidence would be considered or could be considered by the jury in determining the outcome of

the case, and the court does not feel that this problem can be overcome by any kind of curing instruction.

Therefore the court is compelled, regrettably, to grant the motion for mistrial, to order that the case shall be retried at a later time.

Court is aware of the time and the expense that has gone into the case to this point but fairness to the government, fairness to the defense and justice for all concerned in the community requires that the motion for mistrial be granted.

Therefore the motion will be granted with respect to Counts One, this is the motion for mistrial, Counts One, Three, Four, Seven, Eight and Nine.

Now, the jury is not here this morning, gentlemen. They have been, as you know, notified to report at 1:30 this afternoon. They will come in, the **[110]** court will convene and we will then discharge the jury.

Any questions?

MR. GREAN: We take exception to the court's ruling, Your Honor, based on the case authority, we feel certainly supports bringing in evidence of the conspiracy even though it is not charged.

THE COURT: Exception is noted. Court will stand at recess.

(Court recessed at 8:58 a.m.)

* * * *

I, AILEEN N. SYLVA, official court reporter, Circuit, Court, First Judicial Circuit, do hereby cer-

tify the foregoing to be a full, true and correct transcript of my original shorthand notes reported in the above entitled matter on July 10 and 11, 1974, before the HONORABLE WALTER M. HEEN, Twelfth Judge presiding.

/s/ Aileen N. Sylva

Appendix D

In the Supreme Court of the State of Hawaii

October Term 1977

State of Hawaii, Plaintiff-Appellant, vs. Wilford K. Pulawa, Sr., also known as Nappy Pulawa, and Alvin George Kaohu, Defendants-Appellees.	No. 5917
and	
State of Hawaii, Plaintiff-Appellee, vs. Robert R. Wilson, also known as Bobby Wilson, Dannette Beirne Leota, also known as Sister, and Henry James Hanalei Huihui, also known as Henry W. Huihui, Defendants-Appellants.	No. 5923

[Filed Dec. 6, 1977]

PETITION FOR REHEARING

RICHARDSON, C.J., KOBAYASHI, OGATA, MENOR and KIDWELL, JJ.

Per Curiam. The petition for rehearing is denied without argument.

/s/ William S. Richardson
/s/ Bert T. Kobayashi
/s/ Thomas S. Ogata
/s/ Benjamin Menor
/s/ H. B. Kidwell

David C. Schutter
and Brook Hart
for the petition.

Supreme Court, U. S.
FILED
MAY 5 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM 1977

NO. 77-1197

WILFORD K. PULAWA, SR., also known as Nappy Pulawa; ALVIN GEORGE KAOHU; ROBERT R. WILSON, also known as Bobby Wilson; DANNETTE BEIRNE LEOTA, also known as Sister, and HENRY JAMES HANALEI HUIHUI, also known as Henry W. Huihui

Petitioners,

v.

STATE OF HAWAII

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT IN OPPOSITION

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In the Supreme Court
OF THE
United States

OCTOBER TERM 1977

NO. 77-1197

WILFORD K. PULAWA, SR., also known as Nappy Pulawa; ALVIN GEORGE KAOHU; ROBERT R. WILSON, also known as Bobby Wilson; DANNETTE BEIRNE LEOTA, also known as Sister, and HENRY JAMES HANALEI HUIHUI, also known as Henry W. Huihui

Petitioners,

v.

STATE OF HAWAII

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF FOR RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Hawaii, for which review is sought, is found in Appendix A of the Petition, pages i — xiii. The unpublished opinion of the Hawaii Supreme Court denying rehearing filed on December 6, 1977, is found in Appendix D of the Petition, pages xxvi — xxvii. The unpublished decision and amended order filed on June 2, 1975,

and the unpublished order filed on July 15, 1974, and oral opinion rendered on July 11, 1974, of the Circuit Court of the First Circuit, State of Hawaii, are found in Exhibits B and C, respectively, pages xiv — xxv.

JURISDICTION

The judgment of the Hawaii Supreme Court was entered on September 29, 1977, and rehearing was denied on December 6, 1977. The order remanding for trial was filed on January 7, 1978. The Petition for a Writ of Certiorari was filed on February 23, 1978. The jurisdiction of this Court rests upon 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether Petitioners may be retried after their original trial ended pursuant to the granting of their motion for mistrial?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On February 13, 1974, Petitioners were indicted for the crimes of kidnapping, conspiracy, and murder. Mr. Brook Hart represented Defendants Huihui, Leota, and Wilson. Mr. David Schutter represented Defendants Pulawa and Kaohu.

The jury trial of Petitioners commenced on April 29, 1974, and Respondent State of Hawaii rested its case on July 8,

1974. On July 2, 1974, Petitioners jointly filed a written motion for mistrial, asserting that prejudicial testimony had been elicited by Respondent. This motion for mistrial, along with other defense motions, was argued on July 10, 1974, and on July 11, 1974, the trial court dismissed the conspiracy counts on the ground that prosecution had been barred by the statute of limitations. The trial court also declared a mistrial as to the counts of murder and kidnapping contending that the admission of evidence relative to the dismissed conspiracy counts had prejudicially infected the proceeding as to the remaining counts in the indictment.

On April 21, 1975, Petitioners jointly filed a motion to dismiss the remaining counts on double jeopardy grounds, asserting that retrial would violate Article I, Section 8 of the Hawaii Constitution and the Fifth and Fourteenth Amendments to the United States Constitution. The trial court granted the motion as to Petitioners Pulawa and Kaohu, but denied the motion as to Petitioners Huihui, Leota, and Wilson, finding that they did consent to the declaration of the mistrial.

The Hawaii Supreme Court, on September 29, 1977, reversed the trial court's ruling as to Petitioners Pulawa and Kaohu and affirmed as to Petitioners Huihui, Leota, and Wilson. The Hawaii Supreme Court, after a review of the record below, found that Petitioners had jointly moved and argued for mistrial:

> This motion for mistrial, with other defense motions, was heard on July 10, 1974, after the State had rested its case. Mr. Schutter argued for the motion for mistrial, and on at least two occasions Mr. Hart was asked by the court if he joined in Mr. Schutter's motion for mistrial. Both times Mr. Hart replied in the affirmative. The trial court took the various motions under advisement, and on July 11, 1974, announced its rulings. The motion for mistrial was granted and it was Mr. Schutter who prepared the order 'granting motion for mistrial,' which was filed on July 15, 1974.
>
> The order terminating the prosecution was clearly in response to a motion made by the defendants. . . . Having moved for a mistrial, and the trial court having considered their request and declared a mistrial, defendants Pulawa and Kaohu cannot now be heard to complain that the termination of the prosecu-

tion was without their consent. [Petitioners' Appendix A, hereinafter "A.", vi – vii; footnote omitted.]

The Hawaii Supreme Court, after review of the record, concluded that there was no prosecutorial overreaching in this case:

> We have examined the record, including the transcript of the proceedings in the circuit court, and have come to the conclusion that there was no prosecutorial overreaching in this case. The prosecution obviously erred in its assessment of the evidence available to support the formal charges of conspiracy. This error was compounded by its faulty interpretation of the applicable statute of limitations. But there was no deliberate misconduct in the charging of the conspiracy offenses. At worst, there might have been prosecutorial negligence involved. But simple negligence falls far short of the prosecutorial overreaching requisite to the imposition of the double jeopardy prohibition to a retrial. [A. x – xi; footnote omitted.]

In response to Petitioners' argument that Respondent deliberately attempted to gain an unfair advantage at trial by charging conspiracy in order to present highly prejudicial and incompetent evidence in the nature of hearsay and double hearsay, the Hawaii Supreme Court ruled that such evidence and testimony relating to conspiracy was admissible and it made no difference whether the conspiracy to commit these crimes was formally charged. (A. xi – xii.)

> The prosecution is generally entitled to show the entire history of a conspiracy to commit crimes, including the substantive crimes charged from the time of its inception until its consummation. *Territory* v. *Blackman*, *supra*; *Territory* v. *Kitabayashi*, 41 Haw. 428, 434 – 436 (1956). It is entitled to adduce evidence of declarations made by a co-conspirator pursuant to and in furtherance of the conspiracy. Such declarations are admissible against the other conspirators. *State* v. *Yoshino*, 45 Haw. 206, 364 P. 2d 638 (1961); *Territory* v. *Blackman*, *supra*; *Territory* v. *Kitabayashi*, *supra*. Defendant Pulawa's declarations fall into this category. [A. xii.]

The Hawaii Supreme Court, although they were not called upon to decide the propriety of the separate evidentiary rulings of the trial court, went on to state that "much of this evidence was admissible with respect to the substantive crimes charged .... If error was committed in the

reception of certain of the evidence, it was judicial error. There was no judicial overreaching in this case, and none has been charged." (A. xii – xiii.)

Petitioners filed with the Hawaii Supreme Court a Petition for Rehearing which was denied on December 6, 1977, and the order remanding for trial was filed on January 7, 1978.

ARGUMENT

A. PETITIONERS' MOTION FOR MISTRIAL REMOVED ANY BARRIER TO REPROSECUTION.

The Fifth Amendment to the United States Constitution provides that "no person shall ... be subject for the same offense to be twice put in jeopardy of life and limb." This provision was made applicable to the States in the decision of *Benton* v. *Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). The Hawaii Constitution, Article I, Section 8, contains a similar provision.

The mandate of the Double Jeopardy Clause adds a measure of finality to criminal proceedings and protects a defendant from being subjected to repeated attempts at conviction, embarrassment, expense, and ordeal. *Green* v. *United States*, 355 U.S. 184, 187 – 88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957). However, the double jeopardy provision of the Fifth Amendment does not provide that every time a defendant is put to trial he is entitled to go free if such trial fails to end in a final judgment.

> The double jeopardy provision of the Fifth Amendment ... does not mean that every time a defendant is put to trial before a competent tribunal he is entitled to go free if the trial fails to end in a final judgment. Such a rule would create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double jeopardy prohibitin is aimed ... what has been said is enough to show that a defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments. [*Wade* v. *Hunter*, 336 U.S. 684, 688, 689, 69 S.Ct. 834, 93 L.Ed. 974 (1949); cited with approval, *Gori* v. *United States*, 367 U.S. 364, 367, 368, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961).]

The Double Jeopardy Clause does not guarantee a defendant "a single proceeding free from harmful governmental or judicial error." *United States* v. *Jorn*, 400 U.S. 470, 483 — 84, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971).

In deciding whether the Double Jeopardy Clause bars retrial of a defendant after a mistrial declaration, a distinction has been drawn between cases where mistrials are declared *sua sponte* by the court and cases where mistrials are granted at the defendant's request or with his consent. *United States* v. *Martin*, 561 F.2d 135, 138 (8th Cir. 1977).

In circumstances where a mistrial is declared by the court on its own motion, the defedant is precluded from deciding whether to remove the case from the jury. In those instances the issue upon review focuses upon the question of whether there was manifest necessity "for the mistrial." *United States* v. *Jorn*, *supra*, 400 U.S. at 480 — 81.

In the case *sub judice* there was no *sua sponte* declaration of mistrial by the court. The record below, as reviewed by the Hawaii Supreme Court, revealed that the declaration of mistrial was moved for by the Petitioners.

Different considerations must therefore lie when a mistrial is declared at the defendant's request. The Double Jeopardy Clause does not bar reprosecution where the defendant has requested a mistrial. *Lee* v. *United States*, ___ U.S. ___, ___ , 97 S.Ct. 2141, 53 L.Ed.2d 80 (1977); *United States* v. *Jorn*, *supra*, 400 U.S. at 485.

> [W]here circumstances develop not attributable to prosecutorial or judicial overreaching, a motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error. [*United States* v. *Jorn*, *supra*, 400 U.S. at 485.]

This principle reflects the double jeopardy consideration that a defendant be allowed to "retain primary control over the course to be followed in the event of such [judicial or prosecutorial]error." *United States* v. *Dinitz*, 424 U.S. 600, 609, 96 S.Ct. 1075, 47 L.Ed.2d 267 (1976). The rationale is that if the trial had gone to completion and a conviction were returned, an appeal and reversal of that conviction would have allowed for a second trial to be had. In that instance it would

serve no purpose in requiring a defendant to continue with a trial infected with error which would result in a conviction, appeal, reversal, and retrial. The choice, however, remains with the defendant. He may opt for mistrial and a new trial, or he may nonetheless desire to go with the first jury hoping, at best, for an acquittal, but at the same time, realizing the likelihood of conviction, appeal and retrial.

Petitioners in this case had the option to proceed to verdict or to request a mistrial. They chose the latter, and their request for a mistrial, which was honored by the court, removed any barrier to reprosecution.

However, a request for mistrial does not automatically forestall the application of the Double Jeopardy Clause. This Honorable Court has recognized in *United States* v. *Jorn*, *supra*, and *United States* v. *Dinitz*, *supra*, limited circumstances where a defendant's mistrial request does not remove the double jeopardy bar. In those cases where the defendant is prompted by judicial or prosecutorial overreaching into requesting a mistrial and his motion is granted, retrial for the same offense is prohibited.

> Where 'prosecutorial overreaching' exists, a defendant's mistrial request does not remove the constitutional double jeopardy barrier to a retrial. In such a case, the mere fact that the defendant requested a mistrial is not controlling.
>
> Where 'prosecutorial overreaching' is present, the interests protected by the double jeopardy clause outweigh the public interest in conducting a second trial ending in acquittal or conviction. [*United States* v. *Kessler*, 530 F.2d 1246, 1255 — 56 (5th Cir. 1976); footnote omitted.]

B. THE RECORD BELOW IS DEVOID OF ANY JUDICIAL OR PROSECUTORIAL OVERREACHING SUFFICIENT TO BAR RETRIAL OF PETITIONERS.

Once a defendant's request for mistrial or consent to mistrial is demonstrated, the issue then shifts to whether such request is the direct and concomitant result of judicial or prosecutorial overreaching.

The Hawaii Supreme Court found no evidence of judicial overreaching, nor was judicial overreaching alleged by Petitioners in their Petition. The only remaining question is whether

prosecutorial overreaching had occurred.

In approaching the issue of prosecutorial overreaching a two-pronged objective/subjective test should be applied. First, the record should be examined to determine what was the alleged prosecutorial error, and whether such error was prejudicial to the defendant. And, second, if prosecutorial error is found and found to be prejudicial to the defendant, was it motivated by bad faith and was it intentional misconduct on the part of the prosecution. The first prong of this test for overreaching looks for and considers the objective indicia of prejudice to the defendant, and the second prong reviews the subjective motivation of the overreaching party. *See People* v. *Baca*, ___ Colo. ___ , 562 P.2d 411, 414 (1977).

In this case Petitioners were charged with the offenses of murder, kidnapping, and conspiracy. Petitioners' assignment of error was that the formal charge of conspiracy was barred by the applicable statute of limitations. Petitioners claim that they were seriously prejudiced in their defense to the remaining charges, inasmuch as certain prejudicial hearsay statements relating to the conspiracy charge were presented before the jury. Was it error for the prosecution to have charged conspiracy and was that error prejudicial to Petitioners?

On the question of error, the Hawaii Supreme Court, after reviewing the record, found the following:

> The prosecution obviously erred in its assessment of the evidence available to support the formal charges of conspiracy. This error was compounded by its faulty interpretation of the applicable statute of limitations. [A. xi.]

Assuming there was error in charging conspiracy, was this error prejudicial to Petitioners?The Hawaii Supreme Court found no prejudice to Petitioners. The so called prejudicial hearsay statements would have been admissible relative to the substantive crimes charged regardless of whether conspiracy had been formally charged. The Hawaii Supreme Court stated:

> [T]he rule is that a conspiracy may always be shown as an evidentiary fact to prove participation in the substantive crime, and a formal charge in the indictment is not a necessary predicate to the admissibility of facts and circumstances showing the existence of a conspiracy to commit the principal offense charged. The law is clear in this regard. *See Territory* v. *Blackman*, 32 Haw. 460, 464 – 466 (1932); *State* v. *Yoshino*, 45 Haw. 640, 372 P.2d 208 (1962); *Territory* v. *Goto*, 27 Haw. 65 (1923); 16 Am.Jur.2d, *Conspiracy*, § 37. The charges of conspiracy in this case were directed towards the substantive crimes for which the defendants were also charged in the indictment. It would make no difference, therefore, on the question of evidentiary admissibility whether or not conspiracy to commit these particular offenses was formally charged. [A. xi – xii.]

The Hawaii Supreme Court, after examining the record, further stated: "[W]e are constrained to observe that much of this evidence was admissible with respect to the substantive crimes charged." (A. xiii.)

Assuming there was error in charging conspiracy beyond the statute of limitations, this error did not prejudice Petitioners relative to the remaining murder and kidnapping charges.

The increased likelihood of conviction was the motivating factor for Petitioners to request a mistrial; but that increased likelihood was not the result of any undue influence by the prosecution, but rather the result of the greater weight of evidence being against the Petitioners. Because the alleged prosecutorial error did not prejudice Petitioners, there was no prosecutorial overreaching and retrial is not barred.

In reference to the second part of this test, without a finding of prejudice to the Petitioners, this Honorable Court need not consider the second prong which relates to the subjective motivation of the overreaching party. However, if prejudice had been found, this Honorable Court would find that the underlying error was not "motivated by bad faith or undertaken to harass or prejudice" the Petitioners. *United States* v. *Dinitz*, *supra*, 424 U.S. at 611; *Lee* v. *United States*, *supra*, ___ U.S. at ___ , 97 S.Ct. 2141.

The Hawaii Supreme Court found no deliberate misconduct in the charging of conspiracy.

> [T]here was no deliberate misconduct in the charging of the conspiracy offenses. At worst, there might have been prosecutorial negligence involved. But simple negligence falls far short of the prosecutorial overreaching requisite to the imposition of the double jeopardy prohibition to a retrial. *Muller* v. *State*, 478 P.2d 822 (Alaska 1971); *United States* v. *Beasley*, 479 F.2d 1124

(5th Cir.) *cert. denied* 414 U.S. 924, *reh. denied* 414 U.S. 1052 (1973). [A. xi.]

The Hawaii Supreme Court felt that the prosecution may have erred in assessing the evidence available to support the charge of conspiracy compounded with a faulty interpretation of the applicable statute of limitations. [A. xi.] However, this error was not intentional, nor did it constitute gross negligence.

A review of the record below would show that the two prosecutors who prepared the indictment had different theories as to the charging of conspiracy relative to the applicable statute of limitation.[1] They felt, however, that even if conspiracy were not charged, the evidence of conspiracy would have been admissible anyway.[2] The third prosecutor who took

[1] Deputy Prosecutors Michael Weight and Douglas Halsted drafted the indictment. The following statements are from the transcript of the motion to dismiss:

p. 648 [Weight]

A. It was my theory of the case that the conspiracy was in effect, a net effect, an umbrella containing under it the various counts of kidnapping and murder and that the conspiracy was a continuing one, including the concealment phase which did not end on the beach at Mokuleia. It continued on after that, by my theory of the case, including concealment and it was not until late 1973 that this crime came to light.

p. 693 [Halsted]

A. I'll put it this way. I was aware that so far as the theory of the case appeared that the incidents that were being charged happened during February 1970, and that we were, what, in 1973, 1974. I first considered that the so-called old law would apply. That's in Volume 7 of HRS, not the penal code in terms of time limitations. And if you read the section, I can't remember, it's in the 700's of the old HRS, they set out different time limits or there's one paragraph, statute of limitations. The way they do it, they do it negatively. They give you a number of exceptions where the statute doesn't apply. And I had thought that conspiracy charge could be fitted in under what's called compounding offense punishable by life.

[2] p. 676 [Weight]

A. I was aware of this. I was aware that you could either charge conspiracy and proceed on a conspiracy theory or you could not charge conspiracy but still proceed on a conspiracy theory and get the same evidence in. I was aware of that. I felt at the time that in charging the conspiracy it more accurately pictured the crimes that were committed in the course of what happened in February of 1970.

the case to trial was not aware of the statute of limitations problem until raised by the Petitioners at the end of the State's case.[3]

The kinds of prosecutorial misconduct abhorred by the strictures set forth in *United States* v. *Dinitz*, *supra*; *United States* v. *Jorn*, *supra*; *United States* v. *Kessler*, *supra*; and *United States* v. *Martin*, *supra*; are those which relate to actions taken by the prosecutor *during* the trial of a defendant. Concern was expressed for the over zealous prosecutor who resorts to improper methods which may produce a wrongful conviction. *Berger* v. *United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314, 1321 (1935). So to, for the prosecutor who does some act which is calculated to abort a trial which is going badly in order to avoid an acquittal and allow for a second chance at conviction.

The alleged error in the case *sub judice* occurred *prior* to trial. It did not occur during trial in order to obtain a wrongful conviction or to avoid an acquittal. It occurred at a time when a mistrial could not have been foreseen or calculated for. It also occurred at a time when the trial court or the Petitioners themselves could have remedied the error. However, the prosecutor, the court, and the Petitioners themselves, "overlooked it."[4] There was no showing of any intent on the part of the prosecution prior to trial to harass Petitioners or to subject

[3] Deputy Prosecutor Lawrence Grean presented the State's case at the time of trial.

p. 718 [Grean]

A. The only time I became familiar with the statute of limitations in connection with this case was when it was raised by Mr. Hart [defense co-counsel], and, at the end of trial. That is when it first dawned on me.

[4] Attorney Brook Hart, representing Petitioners Huihui, Leota, and Wilson, from the transcript of the motion for mistrial.

p. 565 [Mr. Hart]

Now, perhaps counsel should be admonished for not having done so earlier [moved to dismiss the conspiracy charge]and if we are so admonished, we stand so. We overlooked it [the statute of limitations relating to the conspiracy charge.]But Mr. Grean says they should have done it earlier, we agree. We probably should have found it earlier but we didn't.

them to repeated prosecutions. There was no deliberate or intentional misconduct, no gross negligence, and no prosecutorial overreaching.

The standard in finding "prosecutorial overreaching" is succinctly set forth in *United States* v. *Kessler*, *supra*, 530 F.2d at 1256:

> To find 'prosecutorial overreaching,' the Government must have, through 'gross negligence or intentional misconduct,' caused aggravated circumstances to develop which 'seriously prejudice[d] a defendant' causing him to 'reasonably conclude that a continuation of the tainted proceeding would result in a conviction.' *United States* v. *Dinitz*, *supra*, ___ U.S. at ___, 96 S.Ct. at 1080, 47 L.Ed.2d at 274, 44 U.S.L.W. at 4312.

In the case *sub judice* there was no prosecutorial overreaching. There was no gross negligence or intentional misconduct, and no aggravated circumstances which seriously prejudiced Petitioners. The conclusion that Petitioners reached as to the likelihood of their conviction was based upon the greater weight of evidence against them rather than any improper actions of the prosecutor. In this instance, their request for a mistrial removes any barrier to reprosecution.

CONCLUSION

For the reasons set forth above, we respectfully submit that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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